STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 12, 2009
v	No. 287874 Washtenaw Circuit Court
STANLEY SEAN WRIGHT, Defendant-Appellant.	LC No. 08-000400-FH

Before: Stephens, P.J., and Cavanagh and Owens, JJ.

PER CURIAM.

Defendant appeals as of right from the sentence of one to 15 years in prison imposed on his jury conviction of resisting and obstructing a police officer, MCL 750.81d(1).[1] We affirm.

Ypsilanti Police Officers Houk and McDonagh were called to an apartment building in response to a possible fight in progress. When they entered the building, they saw defendant running up a staircase, with two men behind him. One of the men had a pipe in his hand. Houk drew his weapon, and ordered all of the men to stop. Defendant ran past Houk and out of the building, but the other men stopped. Houk ordered the individual with the pipe to drop it, and he did so. Both men complied when Houk told them to get on the ground. At the same time, McDonagh attempted to detain defendant, and pushed defendant against the building's doorframe to prevent him from fleeing. Defendant began trying to regain entrance to the building, while McDonagh tried to stop him. Officers Vannier and Yuchasz then arrived, and all three officers tried to subdue defendant. All four men fell to the landing inside the apartment door. Defendant began to pull away and crawl down the stairs toward Houk and the two men who had been chasing him. Defendant yelled that he would kill the other men. McDonagh let go of defendant, and sprayed defendant with pepper spray. Defendant continued to struggle until Vannier released his hold and struck defendant on the leg with his baton. This distracted defendant enough for the officers to handcuff him. Defendant had almost reached Houk and the others when he was finally restrained.

[1] Defendant was sentenced as a fourth habitual offender, MCL 769.12. Defendant was acquitted of an additional charge of resisting and obstructing.

Defendant first argues that the trial court erred when it scored ten points for offense variable (OV) 9 (number of victims). He maintains that because he was acquitted of the resisting and obstructing charge pertaining to Vannier and Yuchasz, the trial court should have found that only one officer was placed in danger of injury. We disagree.

When scoring the guidelines, "[a] sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score." *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006). A scoring decision "for which there is any evidence in support will be upheld." *Id*. "The proper interpretation and application of the legislative sentencing guidelines are questions of law, which this Court reviews de novo." *People v Cannon*, 481 Mich 152, 156; 749 NW2d 257 (2008).

MCL 777.39 provides in pertinent part:

> (1) Offense variable 9 is number of victims. Score offense variable 9 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:
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> * * *
>
> (c) There were 2 to 9 victims who were placed in danger of physical injury or death, or 4 to 19 victims who were placed in danger of property loss..... 10 points
>
> * * *
>
> (2) All of the following apply to scoring offense variable 9:
>
> (a) Count each person who was placed in danger of physical injury or loss of life or property as a victim.

In *People v Sargent*, 481 Mich 346; 750 NW2d 161 (2008), our Supreme Court found that it was improper for a trial court to score OV 9 at ten points where the alleged second victim claimed that the defendant had sexually molested her in a separate, uncharged offense. The Court stated, "when scoring OV 9, only people placed in danger of injury or loss of life when the sentencing offense was committed (or, at the most, during the same criminal transaction) should be considered." *Id*. at 350. In contrast to the uncharged acts in that case, the Court noted situations where scoring for multiple victims would be appropriate even where only one conviction resulted, stating, "[f]or example, in a robbery, the defendant may have robbed only one victim, but scoring OV 9 for multiple victims may nevertheless be appropriate if there were other individuals present at the scene of the robbery who were placed in danger of injury or loss of life." This language was consistent with the holding in *People v Morson*, 471 Mich 248; 685 NW2d 203 (2004), where the Court held that ten points were properly assessed under OV 9 when the defendant endangered two victims during an armed robbery, the woman who was robbed and another man standing nearby who was shot by the perpetrator. *Id*. at 253, 261-262. See, also, *Id*. at 277 (Young, J., concurring in part).

However, in *People v McGraw*, 484 Mich 120; 771 NW2d 655 (2009), our Supreme Court narrowed the circumstances under which points for this variable can be scored. In *McGraw*, where the prosecution sought to score points for individuals who were placed in danger during the defendant's flight after a completed breaking and entering in a building, the Court rejected the "transactional approach" hinted at in *Sargent*. Instead, the Court held that, "a defendant's conduct after an offense is completed does not relate back to the sentencing offense for purposes of scoring offense variables unless a variable specifically instructs otherwise." *Id*. at 122. The Court concurred with language in *Sargent* holding that the offense variables were generally "offense-specific" and that, usually, only conduct "relating to the offense" was to be taken into consideration when scoring the offense variables. Contrasting the facts in the case from those in *Morson*, and in the example used in *Sargent*, the *McGraw* Court held that the defendant's flight from the police occurred "after the offense was completed for purposes of scoring the sentencing guidelines"[2] and that it could not therefore be considered in scoring OV 9. *Id*. at 135. The *McGraw* Court found that such conduct could be charged by the prosecution separately, or that the trial court could use this conduct to either decide what the appropriate score within the guidelines should be, or whether to exceed the guidelines. *Id*. at 130-131.

Here, the trial court was not required to score OV 9 at zero points because defendant was acquitted of the remaining resisting and obstructing charge. Because defendant was struggling with all three officers, they all arguably were placed in danger of injury through defendant's resistance, and were placed in danger at the same time. Contrary to defendant's assertion, the trial court could use the evidence of danger to the other officers to score this OV. See *People v Compagnari*, 233 Mich App 233, 236; 590 NW2d 302 (1998) ("although a trial court may not make an independent finding of guilt with respect to a crime for which a defendant has been acquitted, and then sentence the defendant on the basis of that finding, the court in fashioning an appropriate sentence may consider the evidence offered at trial, . . . including other criminal activities established even though the defendant was acquitted of the charges . . . ." (citations omitted)). Moreover, at the time he was resisting, defendant was trying to attack the men who had been chasing him, and would have succeeded if the officers had not stopped him. We would therefore find it reasonable to conclude that they were also placed in danger by defendant's actions. Despite some of the "offense-specific" language used in *McGraw*, this situation is substantially similar to that in *Morson*, which the *McGraw* Court used as a contrasting example to show when scoring multiple victims for one offense is appropriate. *McGraw*, *supra* at 128. Therefore, we find that the trial court did not err in scoring OV 9 at ten points.

Defendant next argues that the trial court erred when it ordered him to pay his court-appointed attorney's fees without making a determination on the record regarding his ability to pay court costs and attorney fees as required by *People v Dunbar*, 264 Mich App 240; 690 NW2d 476 (2004), rev'd in *People v Jackson*, 483 Mich 271; 769 NW2d 630 (2009). Because there was no objection to the trial court's attorney fee order, we review this issue for plain error. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

[2] The Court declined to determine precisely when the breaking and entering offense was completed, stating only that the flight was "far beyond and removed from the sentencing offense." *Id*. at 135 n 45.

In *Jackson*, our Supreme Court overruled *Dunbar*'s requirement that a trial court perform an assessment of a defendant's ability to pay before sentencing. It specifically ruled that a "defendant is not entitled to an ability-to-pay assessment until the imposition of the fee is enforced." *Jackson*, *supra* at 292. The Court reasoned that the relevant United States Supreme Court decisions "do not require a presentence ability-to-pay assessment[,]" that "*Dunbar*'s ability-to-pay rule frustrates the Legislature's legitimate interest in recouping fees for court-appointed attorneys from defendants who eventually gain the ability to pay those fees[,]" and that *Dunbar* conflicts with state statutes (MCL 769.1k and MCL 769.1l) which allow the trial court to impose a fee for a court-appointed attorney and operate irrespective of a defendant's ability to pay. *Id*. at 275, 289-290. The Court also held that, "there is a substantive difference between the imposition of a fee and the enforcement of that fee" and stated that trial courts should not entertain a defendant's ability-to-pay-based challenge to the imposition of fees until enforcement of that imposition has begun. *Id*. at 290. Here, there is no evidence that there has been an attempt to enforce the order requiring defendant to repay attorney fees. Once such enforcement is undertaken, defendant can make a timely objection based on his claimed inability to pay. At that time, defendant will be entitled to an evaluation by the trial court to determine whether he "is indigent and unable to pay *at that time* or whether forced payment would work a manifest hardship on the defendant *at that time*." *Id*. at 293 (emphasis in original).

Affirmed.

/s/ Cynthia Diane Stephens
/s/ Mark J. Cavanagh
/s/ Donald S. Owens